Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

ROBERT HEADLEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the courts of the United States must enforce agreements the Government has entered into when there is no question that the Government entered into the agreement, and there is no question that the individual with whom the agreement was made detrimentally relied upon that agreement and was induced to waive, in the process, statutory and constitutional rights.

PARTIES TO THE PROCEEDING

Petitioner

Robert J. Headley is a citizen of the United States of America and the defendant in the district court in this matter.

Respondent

The United States of America.

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Robert J. Headley respectfully requests that this Court issue a writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals on the merits is unreported and is reproduced in App. A at 1a-25a. The decision of the court of appeals denying the petition for rehearing and rehearing *en banc* is unreported and is reproduced in App. B at 26a-27a.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was issued on September 11, 2000. A timely petition for rehearing *en banc* was denied on October 18, 2000. This Court has jurisdiction under 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the United States Constitution provides, among other things, that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

STATEMENT OF THE CASE

On April 29, 1997, appellant, Robert J. Headley, was indicted on four (4) counts of interstate transportation of stolen property (ITSP) in violation of Title 18 of the United States Code §§ 2314 and 2. It was the third time within two years that the Government had sought and obtained an indictment against Mr. Headley. An earlier indictment charging a violation of the tax code had resulted in a complete acquittal. A second trial on unrelated fraud allegations resulted in a hung jury voting 10-2 for acquittal. The fraud charges were then dismissed.

The ITSP charges were based on a Government allegation that Mr. Headley received more money than he should have from a business in which he was a 50% owner. Specifically, the Government claimed that in the mid to late 1980's, Mr. Headley received more than 50% of the profits of this business even though his agreement with the single other owner called for each to receive 50% of the profits. The Government further claimed that in April and May of 1992, Mr. Headley, who lived and worked in Ohio, paid for four cars from a car dealer in Tennessee and that the money used to buy these cars was the money earned from his business. Therefore, the Government claimed the money used to buy the cars was stolen money which, when used to purchase cars in Tennessee, amounted to the interstate transportation of stolen property.

Mr. Headley filed no motions which would have delayed his trial and insisted on going to trial within the period set by the Speedy Trial Act. The trial was set for July 21, 1997.

During the pendency of the case, the Government continued its five year, relentless investigation of Mr. Headley. The Government informed Mr. Headley that whether he was acquitted on the ITSP charges or not, they intended to charge him with additional allegations including various tax and fraud charges.

Facing near financial ruin and continued risk of incarceration as a result of the Government's threat of a fourth indictment, Mr. Headley, despite a strong belief in his innocence, entered into plea negotiations. The purpose of the plea negotiations was to resolve all aspects of the lengthy investigation and put the matter behind him. In addition to the pending and threatened criminal charges in the United States District Court, there were possible state court charges (as a result of the same investigation) and civil tax liabilities.

The United States Attorney's office, recognizing that it did not have the authority to resolve either the civil tax issue or the potential of state charges, entered into a plea agreement contingent on the separate resolution of those issues. The agreement called for all pending charges to be dismissed, for Mr. Headley to enter a plea to a one count information charging a violation of 26 U.S.C. § 7206(1), and for Mr. Headley to serve a ten month split sentence.

Because of the civil and state contingencies, over which the U.S. Attorney's office had no control, a specific agreement was reached with respect to the conduct of a future trial in "the event the criminal settlement fail[ed] to materialize." (Appendix C at 28a-31a.) The specific agreement dealt with Mr. Headley's concerns that the Government might join the threatened future charges with the ITSP counts, thereby creating an inherent prejudice with respect to the trial of both the ITSP charges and the future tax

charges. The Government therefore agreed that it would not "link any future tax prosecutions with the pending ITSP charges (i.e., the ITSP charges and any future tax charges will be charged and tried as two separate cases)." Mr. Headley therefore agreed to join the Government in moving to continue the trial on the ITSP charges, thus relinquishing his right to be tried within the time required by the Speedy Trial Act.

The criminal settlement did fail to materialize[1] and the Government, in direct violation of its agreement, obtained a superceding indictment linking the ITSP charges with tax and other charges and opposed every attempt to sever them. The additional charges were ultimately tried as one case with the ITSP charges.

The final indictment, contained 12 counts charging various criminal violations. Among those were the four tax violations (counts 5-8) referred to in the Government's agreement. Counts five through eight charged violations of 26 U.S.C. § 1907. Count nine charged a violation of 20 U.S.C. § 1017. Counts ten and eleven charged witness tampering and witness retaliation respectively and count twelve charged an obstruction of justice, the first four counts were the ITSP charges. The case proceeded to trial on June 22, 1998, and concluded on July 23, 1998. The court granted a judgment of

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[1] While the reasons the settlement failed to materialize are irrelevant to the agreement, the Government has alleged several reasons (but admittedly presented no evidence to support them) that it claims released it from its obligation. The fact is that neither the state prosecutor nor the I.R.S. would enter into a written agreement with respect to the contemplated settlement. Thus, Mr. Headley had no way to protect himself from future state prosecutions or further civil liability.

acquittal on Count 12, and the jury returned a verdict of acquittal on Count 11. Counts 1, 2, 3, 4, and 10 were mistried, and eventually dismissed, because the jury failed to reach a verdict on those counts. The jury returned a guilty verdict on Counts 5, 6, 7, 8 and 9.

Exclusive jurisdiction resided with the district court pursuant to 18 U.S.C. § 3231 and the appeal to the United States Court of Appeals was made pursuant to jurisdiction conferred by 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

The decision of the court below in this matter is without precedent. The ultimate holding, that a trial court need not enforce a Government commitment, was not based on any precedent **and** none is cited.

In fact, the proposition that a court need not enforce a Government agreement with a criminal defendant is inconsistent with *Santobello v. New York*, 404 U.S. 257 (1971), and the holding of the 6th Circuit in *United States v. Robison*, 924 F.2d 612 (6th Cir. 1991).

If permitted to stand, this ruling will set the acknowledged precedent that the Government can enter agreements inducing defendants to give up substantial rights and then violate those agreements with impunity, knowing they are not binding upon the court, and the court is not required to enforce them.

The Government expressly (and it acknowledges so) refused to do what it said it would do when the plea failed to materialize. The appellate court ruling is that the courts of the United States are not obligated to interpret and enforce the

Government's agreements even when the individual with whom the agreement was made relied upon it and waived substantial rights in relying upon it.

The Court of Appeals left no doubt that its ruling was meant to establish the proposition that United States courts do not have to enforce the government's agreements with defendants. In refusing to even reach the issue of whether an agreement was made (notwithstanding the Government's acknowledgment of the agreement), the court held:

> We need not reach the question of whether the government made such a promise, however, because we conclude that even if it did, the commitment is not binding on the district court. (Opinion of the United States Court of Appeals for the Sixth Circuit, case # 99:3019 at page 6, Appendix A, page 13a.)

From *Santobello v. New York,* to the Sixth Circuit decision in *United States v. Robinson,* United States courts have upheld the proposition that Government promises must be fulfilled. In this case, both the trial court and the appellate court held that it made no difference that the Government violated its agreement with impunity because the agreement was not binding upon the district court and was therefore, unenforceable. As there is no precedent for such a ruling, Mr. Headley believed he was entering into a valid enforceable agreement with the United States Government.

The circuit courts have consistently interpreted *Santobello* to include fundamental principles of contract law.

> The decision in *Santobello* involved fundamental principles of contract law,

> notably, those concerning mutually binding promises freely given in exchange for valid consideration. *United States v. Bridgeman*, 523 F.2d 1099, 1109-1110 (D.C. Cir. 1975).

In *United States v. Cooper*, 594 F.2d 12 (4th Cir. 1978), the court held that, "both before and since *Santobello*, the courts have understandably drawn heavily on the ready analogies of substantial and remedial contract law to supply the body of doctrine necessary to order plea bargaining practices and to afford relief to defendants aggrieved in the negotiating process. To the extent therefore that there has evolved any general body of "plea bargain law", it is heavily freighted with these contract law analogies." *Id.* at 15-16.

The *Cooper* court went on to find that the constitutional right to "fairness" was wider in scope than that defined by the law of contract. *Id.* at 16-17. The court specifically applied the right to be treated fairly to agreements by the Government.

> When *Santobello* made it plain, however, that the core concept here is the existence of a constitutional right to be treated with "fairness" throughout the process, this presaged inevitably the question of the extent to which contract law may be drawn upon to define the limits of this constitutional right. *Id.* at 16.

When the prosecution makes an agreement with a defendant, the court cannot permit the defendant to be prejudiced. *United States v. Goodrich*, 493 F.2d 390, 393 (9th Cir. 1974); *Smith v. United States*, 321 F.2d 954 (9th Cir. 1963); and *State v. Davis*, 188 So.2d 24 (Fla. App. 1966).

The *Goodrich* court held that when the prosecution makes a deal within its authority and the defendant relies on it in good faith, the court must not let the defendant be prejudiced as a result of that reliance. *Id.* In *Davis*, the court enforced a prosecution promise not to prosecute the defendant if he submitted to a polygraph test. That court held that such an agreement "was a pledge of public faith - a promise made by state officials - and one that should not be lightly disregarded." 188 So.2d at 25.

Here, as a result of the Government's promise, Mr. Headley waived his right to a speedy trial on condition that the ITSP charges would not be joined with additional charges in the event the plea agreement failed to materialize. The Government agreed to this condition, then breached its promise by bringing superceding indictments joining the threatened tax charges with the ITSP charges.

The Government has taken the position that the agreement was not valid and was therefore unenforceable. The Government certainly attempted to convinee Mr. Headley it was valid and enforceable when it entered into the agreement. Yet now it says, "too bad Mr. Headley, it is not valid, too bad you relied upon it." If the decision below is permitted to stand, this type of behavior on the part of the Government becomes enshrined as the law of the land. It should not be. As a people we do not want to condone behavior that will, without a doubt, undermine faith and confidence in the integrity of the administration of justice in the United States of America.

The harm to Mr. Headley, as a result of the Government's express refusal to honor its agreement, is exactly the harm contemplated by the agreement. By joining the threatened tax and related charges with the ITSP charges,

the Government was able to introduce volumes of evidence which would not have been admissible if either the tax or the ITSP charges would have been "charged and tried as two separate cases" as expressly stated in the agreement.

By trying the tax charges with ITSP, the Government was able to introduce unfounded allegations of theft from a disgruntled business partner. The jury did not convict Mr. Headley of the ITSP charges, but was permitted to consider the tax charges along with the prejudicial unfounded ITSP allegations. This jury was not the only jury that failed to convict Mr. Headley of the ITSP charges. After the trial in the district court, Mr. Headley was charged with theft charges in a state court based upon the same allegations. In fact, the state charges mirrored the federal indictment on most points, including the witness intimidation charges. Mr. Headley was acquitted of all charges.

The failure to enforce the agreement was indicative of the unfairness that followed. As a result of a Government attempt to raise a conflict (based upon information which later was shown to be false) with regard to Mr. Headley's attorney, Mr. Headley was forced to get new trial counsel. It was discovered after trial that the new counsel was not licensed to practice in the federal courts. Furthermore, the Government introduced evidence of other acts (a charge which, when raised in state court, resulted in an acquittal) further damaging any semblance of a fair trial. The jury deliberations were lengthy and difficult, resulting in one juror having an *ex parte* discussion with the judge in which complaints about intimidation by other jurors and the conduct of some jurors were raised but never shared with either party.

The point of this discussion, as it relates to the agreement which is the subject of this petition, is that the

questions were close and the harm which resulted from the failure to enforce the agreement was real.

The principle upon which this petition should be granted is simple, fair, and indisputably essential to the integrity of the judicial system. When the Government enters into an agreement with an individual and that individual is induced to rely upon the representations of the Government and induced to give up constitutional and statutory rights, the courts should enforce that agreement. The United States Court of Appeals in the Sixth Circuit took the unequivocal position that courts do not have to enforce such agreements. This Court should grant the petition and rectify a wrong which, as precedent, can only do harm to the judicial system and the fair administration of justice in this country.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed: September 11, 2000]

No. 99-3019

UNITED STATES OF AMERICA,)
Plaintiff-Appellee,)
)
v.)
)
ROBERT HEADLEY,)
Defendant-Appellant.)

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OHIO

BEFORE: NELSON, BATCHELDER and MOORE, Circuit Judges.

ALICE M. BATCHELDER, Circuit Judge. Defendant Robert Headley was convicted in federal court, after trial by jury, of four counts of tax evasion and one count of student loan fraud. In this timely appeal, Headley claims that the district court committed numerous errors during both the guilt and sentencing phases of his conviction. He claims these errors entitle him to a new trial or, at least, reconsideration of the sentence imposed. We affirm the conviction in all respects; we affirm the sentence in every respect except the order of restitution; we vacate the portion of the sentence ordering restitution and remand for further proceedings consistent with this opinion.

I.

Mr. Headley was indicted on April 29, 1997, on four counts of Interstate Transportation of Stolen Property (ITSP). The parties engaged in plea negotiations that ultimately broke down, and no final plea agreement was reached. A superseding indictment, entered on February 5, 1998, added four counts of tax fraud (counts 5-8), one count of student loan fraud (count 9), one count of witness tampering (count 10) and one count of witness retaliation (count 11). A second superseding indictment was entered on April 1, 1998, adding a count for obstruction of justice (count 12).

During the course of the proceedings, the Government filed a notice with the court that Mr. Headley's lawyer, Mr. Whitaker, had a potential conflict of interest. The court held a hearing and found a potential conflict that Mr. Headley would not waive. Mr. Whitaker voluntarily stepped down as trial counsel and was replaced by Mr. Fortado.

The twelve-count indictment was tried before a jury that ultimately found Mr. Headley guilty on counts 5-9, and not guilty on count 11. The jury could not reach a verdict on counts 1-4 and 10, and, upon the Government's motion, the district court dismissed those counts. The court also dismissed count 12.

Mr. Headley moved the court for a judgment of acquittal or alternatively for a new trial, claiming that he had been denied the assistance of William Whitaker, his counsel of choice; that the interstate transportation of stolen property counts should have been severed; and that the Government agents colluded against Mr. Headley by improperly discussing their testimony before actually testifying at trial. Headley also moved for a new trial based upon alleged juror misconduct. The district court denied both motions, and sentenced Mr. Headley to 30 months in prison, 3 years of supervised release, repayment of costs of prosecution in the amount of $15,593, payment of restitution in the amount of $81,742, and payment of a special assessment of $500. Headley timely appealed.

II.

A. Joinder

When Headley was initially indicted on the four counts of ITSP, he engaged in plea negotiations with the prosecution. Because Headley was also the subject of an ongoing tax fraud investigation and a state court prosecution for, among other things, selling cars without titles, he wanted a plea bargain that would resolve all of the outstanding charges at one time. On July 10, 1997, the AUSA sent a letter to Mr. Whitaker, describing the agreement contemplated by the parties--

including the representation that the AUSA had been advised "that the IRS is willing to settle Mr. Headley's civil liability for the subject years in the manner set forth in your proposal,"--and stating:

> Your settlement of the civil liability is not part of the formal criminal settlement and must be completed between you and the IRS separate from the criminal plea agreement. Accordingly, it will be necessary for you to meet with the appropriate officials from the IRS examination division to resolve the civil liability before we can enter a criminal plea agreement. Because this process will take a minimum of several weeks, it will be necessary for Mr. Headley to waive the speedy trial time provisions while we attempt to finalize the resolution of these matters. In light of your concerns that the government might use this additional time period to obtain a superceeding [sic] indictment which would join uncharged tax offenses with the charged ITSP counts, we have agreed and promised that in the event that the above criminal settlement fails to materialize, we will not link any future tax prosecutions with the pending ITSP charges (i.e., the ITSP charges and any future tax charges will be charged and tried as two separate cases).

Headley's attorney, Mr. Whitaker, received the letter and added three handwritten "points of clarification":

> 1) It is understood that this agreement will resolve all matters both Federal and State that the government is now aware of. This has not yet been confirmed by State authorities but it is understood that agreement will be forthcoming.
>
> 2) We have also agreed that should the proposed agreement not be approved, the ITSP charge will be tried before the future tax or any subsequent charges.
>
> 3) Approx. four of the guns mentioned in paragraph 2 belong to other people and may be claimed by them.

The handwritten points were initialed by Mr. Whitaker and the AUSA prosecuting the case.

Notwithstanding the fact that all of the requisite government agencies agreed to terms of the proposed plea agreement, Mr. Whitaker appeared before the trial court on November 7, 1997, and informed the district court that Mr. Headley had changed his mind and now wanted a trial, and he therefore would not plead guilty under the terms of the proposed agreement. The Government then obtained the February 5 and April 1, 1998, superseding indictments described above, which included, *inter alia*, four counts of tax evasion.

Mr. Headley moved to sever the ITSP counts from the other counts on the grounds that joinder was inappropriate, was prejudicial, and should be precluded because in its July

10, 1997, letter the Government had promised not to join the tax and ITSP counts. The motion to sever was discussed at the June 15, 1998, pretrial hearing before the district court. The district court denied the motion. First, the court opined that the agreement did not contemplate, as Headley claimed, that if the plea agreement failed to materialize solely because Headley backed out of the agreement, the Government would not join the tax fraud counts with the ITSP counts; second, the court held that even if that had been the intention of the parties, such an agreement would not be binding on the court.

Mr. Headley then moved to dismiss Counts 1 through 4 as violating the Speedy Trial Act, arguing that his earlier waiver of the Speedy Trial Act as part of the plea negotiations was ineffective because the Government breached the deal. The district court denied the motion after considerable discussion at the June 22, 1998, pretrial hearing, concluding that the parties never reached a binding plea agreement and that any agreement of how the trial should be structured would not be binding on the court in any event. Mr. Headley claims that the district court's refusal to enforce the Government's promise to try the tax and ITSP separately is reversible error.[1]

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[1] The Government argues that because Headley failed to renew his motion to sever at the close of the evidence, he waived his right to appeal the denial of his motion to sever. *See United States v. Swift*, 809 F.2d 320, 323 (6th Cir. 1987) ("As a prospective ruling affecting cases tried after January 1, 1987, we hold that a severance motion will be deemed waived if it is not renewed at the end of evidence."); *see also United States v. Allen*, 160 F.3d 1096, 1106 (6th Cir. 1998) ("[W]e unequivocally stated

The United States Supreme Court has held that when a prosecutor makes a promise that induces a criminal defendant to plead guilty, that promise must be fulfilled. *See Santobello v. New York*, 404 U.S. 257, 262 (1971) ("Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."). We have held that "plea agreements are contractual in nature. In interpreting and enforcing them, we are to use traditional principles of contract law." *United States v. Robison*, 924 F.2d 612, 613 (6th Cir. 1991).

These cases are not controlling on the question before us. The parties never entered into a plea agreement, and no Government action induced Mr. Headley to plead guilty.

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that failure to renew a motion to sever at the close of evidence results in waiver of the motion."). Because of the peculiar basis for the motion in this case, we think the better course is for us to review the district court's action in denying the motion. We note further, however, that even if we were inclined to find that the district court erred in denying the motion, misjoinder can constitute harmless error. *See United States v. Bibby*, 752 F.2d 1116, 1121 (6th Cir. 1985) We consider the fact that the jury acquitted Headley of the ITSP charges as good evidence that even if the district court improperly allowed the charges to be tried in the same trial, that error was harmless. *See United States v. Anderson*, 809 F.2d 1281, 1288-89 (7th Cir. 1987) ("The fact that the jury acquitted Marine on tax evasion and convicted him on the lesser included offense of filing a false return tends to negate any possibility that he was prejudiced on the tax count by its joinder with the other counts.").

Indeed, no Government action induced him to do anything. Therefore, the only questions presented are whether the terms of the letter constituted a promise by the Government, even in the absence of a plea agreement, to try the ITSP counts separately from the other pending charges and whether such a promise could be enforced. We need not reach the question of whether the Government made such a promise, however, because we conclude that even if it did, the commitment is not binding on the district court.

The district court has the authority to join in one trial charges separately indicted if those charges could have been joined in a single indictment. *See* FED. R. CRIM. P. 13 ("The court may order two or more indictments or informations or both to be tried together if the offenses . . . could have been joined in a single indictment or information."). In this case, the Government alleged that the money earned by Headley in the illegal transportation of stolen property was not properly reported as income on Headley's tax returns. We have no doubt under this Circuit's precedents that the ITSP charges and the tax evasion charges were amenable to being joined in a single indictment. *See United States v. Bibby*, 752 F.2d 1116, 1121 (6th Cir. 1985) ("It is appropriate to combine tax charges against one defendant with fraud charges against that same defendant and other codefendents if the tax evasion charges arise directly out of the common illicit enterprise."); *see also United States v. Wirsing*, 719 F.2d 859, 863-64 (6th Cir. 1983) (rejecting a per se rule that joinder of tax and non-tax offenses is improper and holding that when "the joined counts are logically related, and there is a large area of overlapping proof, joinder is appropriate."). Because the trial judge has the authority under Fed. R. Crim. P. 13 to consolidate two related indictments into a single trial, a

promise by the Government to indict separately would not prevent the district court from consolidating those indictments. The district court refused to sever the counts because it wanted them tried together, and believed, correctly, that under the circumstances of this case, the Government's commitment to the contrary--if there was one--did not bind the court. Thus, Headley's argument that the trial court erred in refusing to sever the charges on the ground that the Government breached its promise is without merit.

B. Ineffective Assistance of Counsel

Mr. Headley's trial counsel was attorney Matthew Fortado. After the trial, it was learned that Mr. Fortado's right to practice before the federal court had been terminated in 1996 and during Headley's trial, he was not admitted to practice before the district court. Mr. Headley argues on appeal that Mr. Fortado's disciplinary status rendered his performance as trial counsel per se ineffective. We disagree.

Mr. Fortado was suspended from the practice of law in Ohio for two years effective February 28, 1996. *See Office of Disciplinary Counsel v. Fortado*, 74 Ohio St. 3d 604, 606-07 (1996). However, one year of the suspension was stayed on the condition that Fortado fulfill the terms of his contract under the Ohio Lawyers Assistance Program, Inc., and that he be monitored by two attorneys upon re-entering his legal practice. *See id.* at 606. On the basis of the Ohio Supreme Court's disciplinary action, Chief Judge White of the federal district court ordered that "[t]he name of Matthew Fortado shall be stricken from the roll of attorneys admitted to practice law before the United States District Court for the Northern District of Ohio" effective June 4, 1996. After serving one

year of his suspension, Mr. Fortado applied to be reinstated to the Ohio bar, and on August 22, 1997, the Ohio Supreme Court reinstated him, with the condition that he remain on probation for one year under the supervision of two attorneys. *See Office of Disciplinary Counsel v. Fortado*, 79 Ohio St. 3d 1232 (1997). On December 22, 1998, upon finding that Fortado had complied with all the conditions of his probation, the Ohio Supreme Court terminated Fortado's probationary status. *See Office of Disciplinary Counsel v. Fortado*, 84 Ohio St. 3d 1223 (1998). When Mr. Fortado entered his appearance on behalf of Mr. Headley on April 7, 1998, his license to practice law had been reinstated by the Ohio Supreme Court, but he was still serving his one-year probationary period. At the time of the trial, therefore, Fortado was licensed to practice law in Ohio. He had not, however, been readmitted to practice in the federal court.

In this appeal, Mr. Headley argues that because Mr. Fortado was not licensed to practice before the District Court, his representation of Headley at trial was ineffective and violated Headley's Sixth Amendment right to counsel. *See generally Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). Rather than apply the *Strickland* factors to determine the ineffectiveness of counsel, however, Headley suggests that this Circuit should follow the Second Circuit's per se rule that an unlicensed attorney is, by definition, ineffective. *See Solina v. United States*, 709 F.2d 160 (2d Cir. 1983).

The Government argues that because Headley wholly failed to raise any claim of ineffective assistance of counsel below, we must review this claim for clear error, and that the record is insufficient to review the claim. Headley, however,

claims that he was ignorant of Fortado's status before the federal court until the notice of appeal was filed by Fortado in this Court, and the Clerk for the Sixth Circuit notified Headley of Fortado's status. Thus, he claims, he should not be penalized for his ignorance at trial.

We will not ordinarily consider on direct appeal claims of ineffective assistance of counsel in the trial court, *see United States v. Pruitt*, 156 F.3d 638, 646 (6th Cir. 1998); however, we have recognized an exception to this rule in cases in which the record is sufficiently developed to permit us to assess properly the merits of the claim. *See id.* Here, the facts with regard to the status of Headley's counsel's license to practice law are a matter of public record and are not in dispute. Therefore, whether Headley's counsel was ineffective per se because of his not having been admitted to practice before the federal court is a legal question which requires no further development of the record from the trial court, and we will entertain the claim.

We have been faced with the question of the effectiveness of an unlicensed attorney several times. *See Pruitt*, 156 F.3d 638 (6th Cir. 1998); *Blanton v. United States*, 94 F.3d 227 (6th Cir. 1996); and *Sexton v. United States*, No. 94-5611, 1995 WL 521157 (6th Cir. Sep. 1, 1995). However, we have not yet definitively spoken on the applicability of a per se rule, such as the one presented in *Solina*. *See Pruitt*, 156 F.3d at 646 n.2 ("This court has not addressed the issue of whether representation by an unlicensed attorney is a per se violation of the right to counsel.").

In *Sexton*, the defendant was represented by a team of six lawyers, five of whom were admitted to practice before

the District Court for the Western District of Kentucky. The lawyer not admitted to practice before the federal court, however, was a member in good standing of the District of Columbia bar. We held that it was not necessary to determine whether the per se rule of *Solina* should be adopted because the defendant had failed to "carry his burden of showing that [his counsel] lacks a license to practice law." *See Sexton*, 1995 U.S. App. LEXIS 32900, *6, 1995 WL 521157 at *2. Furthermore, we noted that *Solina's* per se rule had been rejected by both the Ninth and Tenth Circuits. *See id.*

When we again considered the issue, it was in the context of a request for a writ of error coram nobis. The defendant was tried in federal court for mail fraud and a violation of the Hobbs Act. The defendant sought the writ on the grounds that his lawyer was ineffective because he was unlicensed. We found that trial counsel's license to practice had been challenged in the late 70's, but the Tennessee Supreme Court ultimately concluded that it would "take no further action in connection with [his] license to practice law in this state." *See Blanton*, 94 F.3d at 230. The district court declined to consider whether the lawyer had a valid license because "it had no power to determine whether [the lawyer] was licensed to practice law" and because even if the lawyer were not licensed, it would not be ineffective assistance of counsel per se. *Id.* On appeal, we considered the district court's authority to consider the status of the lawyer's license, and held that "[t]he district court was correct, however, in its determination that it had no power to conduct such an inquiry." *Id.* at 233. Deferring to the Tennessee Supreme Court's decision not to pursue further action, we held that the defendant was not denied effective assistance of counsel. *See id.* at 235.

Finally, we considered the issue again in the consolidated direct appeal of several criminal defendants from a drug conspiracy conviction. In that case, only one of the defendants raised the ineffective assistance claim, and it was not clear from the record that the defendant's counsel was in fact unlicensed, as the defendant claimed. Because the defendant had failed to raise the claim before the district court we declined to consider it on the merits "so that an adequate factual record may be developed." *Pruitt*, 156 F.3d at 646.

We need not reach the issue of whether to adopt the per se rule of *Solina*, because we are not persuaded that Headley even raises a claim to which such a rule would apply. There is no dispute that Fortado was licensed to practice law in Ohio at the time of Headley's trial; accordingly, we think that the reasoning and conclusion of *Sexton* apply here, and we hold that, like Sexton, Headley failed to carry his burden of showing that Fortado lacked a license to practice law.

C. Denial of the right to testify

Mr. Headley further contends that Mr. Fortado's assistance was ineffective in a number of particulars, among others, that Fortado precluded him from exercising his constitutional right to testify on his own behalf at trial. However, Headley never raised this issue in the district court. We will not ordinarily consider on direct appeal issues not raised in the district court. *See United States v. Critton*, 43 F.3d 1089, 1094 (6th Cir. 1995). More particularly, we ordinarily do not entertain on direct appeal claims of ineffective assistance of trial counsel, *see Pruitt*, 156 F.3d 638, 646, and although we have recognized an exception to this rule in cases in which the record is sufficiently developed

to permit us to assess properly the merits of the claim, *see id.*, this is not such a case. Accordingly, we decline to entertain this assignment of error.

D. Admission of evidence

Mr. Headley contends that the district court erred when it allowed inadmissibly prejudicial material to be presented to the jury. Although he does not cite to any rule of evidence as a basis for arguing that the evidence was inadmissible, presumably he is arguing that certain items should have been excluded under Fed. R. Evid. 403.[2] We review a district court's evidentiary determinations for an abuse of discretion. *See United States v. Moore*, 954 F.2d 379, 381 (6th Cir. 1992).

Mr. Headley challenges the admissibility of evidence in four specific areas--the taped conversations in which Headley discussed assaulting Mr. Axner (his former wife's divorce attorney); the testimony of the Government's tax expert, Julie Studt; evidence of Mr. Headley's net worth; and repeated testimony that Headley had income from dealing in stolen cars.

1. The taped conversations. In 1992, when Headley was divorcing his wife Sharon, he hatched a plan to

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[2] FED. R. EVID. 403: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

assault Sharon's attorney, Arthur Axner. Unbeknownst to Headley, a Government informant was involved in planning the assault, and Headley's telephone conversations with the informant were recorded. At trial, the Government argued that the tapes were admissible under Fed. R. Evid. 404(b) because Headley had been charged in this case with witness tampering and witness intimidation for the threats he made against his former wife, Sharon. The district court determined that the tapes were admissible to show motive and specific intent on Counts 10 and 11 of the indictment and also to rebut Headley's claim in opening statements at trial that his comments about "wanting Sharon Headley dead" were merely innocent statements made in frustration.

The district court carefully considered the admissibility of the tapes and made a detailed ruling on the record. It is clear from the transcript of the proceedings that the district court carefully considered both Rule 403 and Rule 404(b) and ordered portions of the tapes redacted to minimize the prejudice. She also gave specific limiting instructions to the jury the same day the evidence was received. Therefore, the district court did not abuse its discretion in allowing the tapes to be admitted.[3]

2. Testimony of tax expert, Julie Studt. Mr. Headley argues on appeal that certain "net worth" testimony

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[3] We also note that the tapes were admitted in connection with Counts 10 and 11 of the indictment. Considering that Headley was acquitted of Count 11 and the jury hung on Count 10, we find it difficult to see how he was prejudiced by the admission of the tape recordings.

by Ms. Studt was improperly admitted at trial. Attorney Fortado objected to Ms. Studt's testimony, and he objected that he had not been provided documentation in advance that would back up much of the testimony. The district court addressed the issue with the parties before allowing Ms. Studt to continue testifying the next day, and advised the parties that it would instruct the jury to disregard the testimony to which the defendant objected. Mr. Fortado agreed with the district court's resolution of the matter, and once the jury was seated, the district court immediately explained to the jury that certain parts of the testimony would be stricken, saying, "That means to the extent [Ms. Studt] expressed any opinions about Mr. Headley's disposable income after examination of what she categorized as personal versus business expenses, you are to disregard all of that testimony." Because Headley got the remedy he sought at trial, he cannot now, having been convicted on the tax counts, second guess Fortado's judgment. In any event, we find no abuse of discretion by the district court.

3. Other testimony regarding Headley's net worth. In his appeal, Headley argues that "witness after witness testified to net worth type expenditures of Mr. Headley . . . the cumulative effect of such testimony clearly denied Mr. Headley a fair trial." The Government, citing *Eggleton v. United States*, 227 F.2d 493, 497-98 (6th Cir. 1955), counters that evidence of a defendant's net worth "is admissible in a specific items tax case to show a defendant had unreported income, particularly where, as here, records of a defendant's true business expenses do not exist." The Government also contends that some of the "net worth" evidence was relevant to Headley's failure to claim the full value of his business assets on his student loan application.

Headley made no contemporaneous objection to any of this testimony except that of Rocco Ferruccio. We review for plain error the testimony to which no objection was made; we review for abuse of discretion the rulings with regard to Ferruccio's testimony. After carefully reviewing the record, we find neither abuse of discretion nor plain error with regard to the admission of any of the testimony.

4. Testimony regarding "stolen car" transactions. Headley claims he was prejudiced because the Government introduced the testimony of Detective Mulhearn that "detailed numerous transactions involving the sale of automobiles" and the testimony "prejudicially and falsely created the impression that the vehicles involved were stolen." The Government counters that the testimony was properly admitted because "[t]he circumstances under which Headley acquired and sold several of these vehicles in 1991 and 1992 were part of the *res gestae* to show Headley had income that he did not report for purposes of Counts 5 and 6."

To protect against undue prejudice, the district court ruled that all references to "stolen vehicles" must be eliminated in the presentation of evidence; for example, theft reports were referred to as "missing vehicles" reports. The district court also gave an adequate and appropriate limiting instruction at the end of the day the evidence was presented. There is no doubt that Detective Mulhearn's testimony was relevant to the charges against Headley, and we find that no abuse of discretion in the district court's allowing the jury to hear it.

5. Cumulative effect of these "errors". Headley argues that the cumulative effect of the district court's

"errors" was an unfair trial. However, because we hold that there was no error in the admission of this evidence when considered separately, there can be no error resulting from its "cumulative effect."

E. Fed. R. Evid. 615

Headley argues that the district court violated Fed. R. Evid 615[4] when it allowed two IRS agents to sit at counsel table for the entire trial and then allowed both agents to testify against Mr. Headley at the very end of the presentation of the Government's case. Moreover, Headley contends that the agents improperly colluded against Headley by discussing Agent's Nutt's testimony over the weekend when Agent Kacarab was unable to be in the courtroom at the time Agent's Nutt's testimony was presented. Thereafter, Agent Kacarab himself testified.

On appeal, the Government argues that the applicable provision of Fed. R. Evid. 615 is subpart (3) because both agents were essential to the orderly presentation of the huge volume of exhibits in the Government's case. Citing *United*

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[4] FED. R. EVID. 615: At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present.

States v. Mohney, 949 F.2d 1397, 1405 (6th Cir. 1992), the Government argues that, in this Circuit, it is acceptable for the trial court to allow an expert to sit through other witnesses' testimony if that expert is required for the management of the case. The Government argues that the case cited by Headley, *United States v. Pulley* 922 F.2d 1283 (6th Cir. 1991), is inapplicable because it relates to subpart (2) of Fed. R. Evid. 615. *See Mohney*, 949 F.2d at 1405 (distinguishing *Pulley* on the grounds that it applies to Fed. R. Evid. 615(2)).

Fortado did not object to the alleged violation of Rule 615 at trial, although he did move for dismissal on the grounds that the agents colluded by discussing the trial testimony over the weekend. The district court denied the motion to dismiss.

The *Mohney* case is on point and we believe it controls our decision. In that case, the appeal was brought from a conviction for filing false income tax returns. The testifying IRS agents attended the entire trial and the defendant appealed, *inter alia*, on the grounds that they should have been sequestered. We said:

> The decision to permit a witness to remain in the courtroom "is within the discretion of the trial judge and should not normally be disturbed on appeal." . . . Therefore, "where a fair showing has been made that the expert witness is in fact required for the management of the case, and this is made clear to the trial court, we believe that the trial court is bound

> to accept any reasonable, substantiated representation to this effect by counsel."

Mohney, 949 F.2d at 1404-05.

In this case, the sequestration of the case agents was not raised before the trial court[5] so the Government did not have an opportunity to present a "reasonable, substantiated representation" to the district court. The defendant has not preserved the issue for appeal, but, in any event, the Government explains that both agents were necessary to "assist with the thousands of exhibits." This contention is reasonable and is substantiated by the record. We find no merit in this claim.

F. Juror Misconduct

Several days after the verdict was rendered, two of the jurors approached defense counsel alleging that they had been bullied into voting for a guilty verdict against their better judgment. The jurors claimed that they were pressured to vote guilty; that the foreperson refused to tell the court they were deadlocked; and that the foreperson threatened to have one juror, Mr. Sheller, removed from the jury if he didn't vote with the group. An affidavit was prepared, but only juror Sheller agreed to sign it. Headley moved for a new trial on

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[5] Although Headley makes the bald assertion in his brief that court permitted the two agents to sit at the prosecution table "over defense objection," the defendant points to nothing in the record before us to support that assertion and we have found no support for it.

the grounds of juror misconduct. The district court denied the motion because Fed. R. Evid. 606(b)[6] prohibits any inquiry into the internal aspects of the jury's deliberations. Moreover, the district court reviewed several aspects of the affidavit that directly contradicted the record and therefore concluded that the affidavit was not worthy of belief.[7]

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[6] FED. R. EVID. 606: (a) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

[7] As an example, the district court noted that Mr. Sheller indicated he was pressured to vote guilty because the foreperson refused to notify the court they were deadlocked and threatened to remove him as a juror. He says he succumbed to the pressure and voted guilty after the district court issued the *Allen* charge. The

Because the trial judge is in the best position to determine the nature of the alleged jury misconduct, we review the district court's decision for abuse of discretion. *See United States v. Copeland*, 51 F.3d 611, 613 (6th Cir. 1995). The district court concluded that the conduct alleged by the jurors was an internal influence and not subject to judicial review. We have described internal influences to include "the behavior of jurors during deliberations, the jurors' ability to hear or comprehend trial testimony, and 'physical or mental competence of a juror.'" *United States v. Herndon*, 156 F.3d 629, 634-35 (6th Cir. 1998). Plainly, all of the challenges mounted by Headley are related to the behavior of the jurors during deliberations. Headley tries to parlay the alleged threat by the foreperson to remove Mr. Sheller from the jury into an external influence because a third party would have been involved had the threat been carried out. Headley's argument is not even reasonable. There was no abuse of discretion by the district court.

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record is clear, however, that all of the guilty verdicts ultimately entered against Mr. Headley were reached after the first day of deliberations; the verdict form was signed by all the jurors at that time. Subsequently, the jury reported they had reached verdicts on some counts but were hung on several other counts. They reported several times until the judge finally gave the *Allen* charge two days later. This chronology makes it clear that Sheller's allegation--that he finally gave in to the pressure to convict after the *Allen* charge was given--is false.

G. Sufficiency of the evidence

Mr. Headley claims that the Government did not produce sufficient evidence against him to support his convictions for tax evasion and student loan fraud. In reviewing claims of insufficient evidence, we have set forth the proper inquiry:

> When reviewing challenges to the sufficiency of the evidence supporting criminal convictions, we must ask "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." We must also resolve all reasonable inferences in favor of the government.

United States v. Layne, 192 F.3d 556, 567 (6th Cir. 1999) (internal citations omitted). We have reviewed the record and are firmly convinced that a rational trier of fact, when presented with the evidence set forth in this case, could have found all the essential elements of the crime beyond a reasonable doubt. We find no merit to this claim.

H. Sentencing

Mr. Headley charges that seven errors were made with respect to his sentencing. The district court's factual determinations at sentencing are reviewed for clear error, and the application of the guidelines to a particular set of facts is reviewed *de novo*. *See United States v. Pierce*, 17 F.3d 146, 151 (6th Cir. 1994). It should be noted that Mr. Fortado failed to file his objections to the presentence report with the district court as required by Fed. R. Crim. P. 32.

Notwithstanding this fact, the district court did give some consideration to the defendant's objections at sentencing. We have carefully reviewed the record with regard to the sentencing proceedings, and we find no error. Because, as we explain below, it is not clear on what basis the district court sentenced Headley to make restitution, we will address that aspect of the sentence.

Mr. Headley claims that the district court erred in ordering restitution under 18 U.S.C. § 3663 ("VWPA"), which authorizes restitution only for Title 18 offenses. The Government argues that the district court ordered restitution as part of Mr Headley's supervised release.

Restitution can be imposed, as part of a criminal sentence, only for violations of the specific code sections cited in the VWPA. *See* 18 U.S.C. § 3663(a) (including all Title 18 offenses and certain enumerated offenses in Titles 21 and 46). However, 18 U.S.C. § 3583(d) permits restitution to be ordered in other, non-enumerated offenses *when it is imposed as a condition of supervised release*. We have held that when restitution is ordered as a condition of supervised release, it is not limited to only those offenses that are enumerated in the VWPA (codified at 18 U.S.C. § § 3663, 3664). *See Gall v. United States*, 21 F.3d 107, 109-10 (6th Cir. 1994) ("Thus, the district court, in the case at bar, had the authority to order restitution as a condition of supervised release following a 21 U.S.C. § 841(a)(1) conviction."). We also noted that it is possible for the Government to be considered a victim for purposes of restitution under 18 U.S.C. § 3663 if the loss is directly resulting from the defendant's criminal activity. *See Gall*, 21 F.3d at 111-12. Further, the Second Circuit has directly considered the issue and has held that one convicted

of tax fraud could be properly required to pay restitution to the IRS as part of supervised release. *See United States v. Bok*, 156 F.3d 157, 166 (2d Cir. 1998). The district court therefore had the authority to order restitution as part of supervised release. The question is whether the judgment and sentencing transcript indicate that the district court intended to enter a separate restitution order under the VWPA (which it did not have authority to do) or whether it intended the restitution to be part of Headley's supervised release (which it did have the authority to do). Because the record is not clear on this point, we will vacate that portion only of the sentencing order and remand the case to the district court for resentencing consistent with this opinion.

CONCLUSION

For the foregoing reasons, Mr. Headley's conviction and sentence are AFFIRMED in all respects, save one. We VACATE the portion of the order requiring Headley to make restitution, and REMAND this case to the district court for resentencing in a manner consistent with this opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed: October 18, 2000]

No. 99-3019

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT HEADLEY,
Defendant-Appellant.

ORDER

BEFORE: NELSON, BATCHELDER, and MOORE, Circuit Judges.

The court having received a petition for rehearing *en banc*, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing *en banc*, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX C

[FOLD-OUT]

FACSIMILE TRANSMISSION COVER SHEET

DEPARTMENT OF JUSTICE
OFFICE OF THE UNITED STATES ATTORNEY
NORTHERN DISTRICT OF OHIO
1800 BANK ONE CENTER
600 SUPERIOR AVENUE, EAST
CLEVELAND, OHIO 44114-2600

EMILY M. SWEENEY
UNITED STATES ATTORNEY

FAX NO: (216)522-7358 FTS 8-216-522-7358 TELEPHONE: (216) 622-3600; FTS 8-216-622-3600

FACSIMILE OUTGOING TRANSMISSION COVER SHEET

TO: Bill Whitaker **FAX NO:** 330-253-6524

ORGANIZATION:

DATE: 7-21-97 **PHONE:** 330-762-0287

FROM: AUSA Tom Gruccinski

PHONE: (216) 622-3914

NUMBER OF PAGES: 2 (EXCLUDING FAX TRANSMISSION COVER SHEET)

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GOVERNMENT EXHIBIT 3

U.S. Department of Justice

United States Attorney
Northern District of Ohio
Organized Crime Strike Force Unit

1800 Bank One Center
600 Superior Avenue East
Cleveland, Ohio 44114-2600

July 10, 1997

William T. Whitaker, Esq.
80 South Summit Street
300 Courtyard Square
Akron, OH 44308

Re: United States v. Robert J. Headley; 5:97CR130

Dear Mr. Whitaker:

This letter confirms our recent conversations regarding settlement negotiations in the above entitled case.

The government has offered to dismiss the pending charges against Mr. Headley provided Mr. Headley pleads guilty to a one count information charging him with violating 26 U.S.C. § 7206(1) as part of a plea agreement in which Mr. Headley and the government agree to a 10 month split sentence and Mr. Headley agrees to abandon to the government the weapons the government seized from Mr. Headley's house. You have advised us that Mr. Headley has agreed to those terms provided he can resolve his civil tax liability with the IRS, thereby putting all of his problems with the IRS behind him. You have advised us that Mr. Headley is willing to pay the IRS a total of $90,000, comprised of a $40,000 refund check the IRS is currently holding plus the payment of an additional $50,000 lump sum payment at the time of the civil settlement. We have conveyed that offer to the appropriate authorities at the IRS and are advised that the IRS is willing to settle Mr. Headley's civil liability for the subject years in the manner set forth in your proposal.

Your settlement of the civil liability is not part of the formal criminal settlement and must be completed between you and the IRS separate from the criminal plea agreement. Accordingly, it will be necessary for you to meet with the appropriate officials from the IRS examination division to resolve the civil liability before we can enter a criminal plea agreement. Because this process will take a minimum of several weeks, it will be necessary for Mr. Headley to waive the speedy trial time provisions while we attempt to finalize the resolution of these matters. In light of your concerns that the government might use this additional time period to obtain a superceeding indictment which would join uncharged tax offenses with the charged ITSP counts, we have agreed and promised that in the event the above criminal settlement fails to materialize,

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we will not link any future tax prosecutions with the pending ITSP charges (i.e. the ITSP charges and any future tax charges will be charged and tried as two separate cases).

We trust that the above accurately reflects your understanding of our prior conversations. We have enclosed a motion to toll the Speedy Trial Act. Please execute the motion and immediately return it so we can file it with the Court as quickly as possible.

Sincerely;

Craig S. Morford
Asst. U.S. Attorney

Three points of clarification:

1) It is understood that this agreement will resolve all matters both Federal and State that the Government is now aware of. This has not yet been confirmed by State authorities but it is understood that agreement will be forthcoming.

2) We have also agreed that should the proposed agreement not be approved the ITSP charge will be tried before the future tax or any subsequent charges.

3) Approximation of the guns mentioned in paragraph 2 belong to other people and may be claimed by them.

TJG

** TX CONFIRMATION REPORT ** AS OF JUL 21 '97 12:29 PAGE.01

U.S. ATTY CLEVE.

	DATE	TIME	TO/FROM	MODE	MIN'SEC	PGS	STATUS
01	7/21	12:27	3302536524	EC--S	01'28	03	OK